Filed 5/3/04 Opinion on remand

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS CHAVEZ et al.,

Defendants and Appellants.

F034110

(Super. Ct. No. 98-41328)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant Marcos Chavez.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Guzman.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Prado.

*Under California Rules of Court, rules 976(b) and 976.1, only the introduction, Procedural and Factual Histories, part I, and the Disposition are certified for publication.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Patrick J. Whalen, Deputy Attorneys General, for Plaintiff and Respondent.

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This case involves the shooting, by occupants of a car, of a group of youths in another car. As a result, a young woman was killed and two others suffered gunshot wounds. The three appellants were each charged with one count of first degree murder pursuant to the first degree drive-by murder statutes (Pen. Code, §§ 189, 190.2, subd. (a)(21)), four counts of attempted willful, deliberate, and premeditated murder, and related charges. The appellants were convicted of all the charges and sentenced to life without the possibility of parole for the first degree murder charges; they received additional sentences on the other charges. In this appeal, appellants argue, among other things, that the jury was instructed incorrectly on the drive-by murder charges.

We affirm in part and publish to clarify the proper instruction of juries regarding charges based on the first degree drive-by murder statutes. In the published portion of this opinion, we conclude that first degree drive-by murder is not felony murder, and that although premeditation is not required to establish the crime, a specific intent to kill is required. The jury was not properly instructed on these issues, but the error was harmless. In the unpublished sections, we decide that the jury was properly instructed in other respects or that instructional error was harmless; that the sentences of life without the possibility of parole imposed here were not cruel or unusual; that the jury was not required to agree on a single theory of murder; and that certain sentence enhancements were properly imposed. But we stay improper four- and eight-month enhancements imposed on appellant Chavez and strike a fine improperly imposed on him.

## ***PROCEDURAL HISTORY***

An information was filed October 15, 1998, charging Marcos Chavez (Chavez), Jaime Guzman (Guzman), and Alejandro Prado (Prado) (appellants) with multiple

felonies. In count 1, appellants were charged with the murder of Marlene Romero in violation of Penal Code section 187.[1] It was alleged that the murder was intentional and perpetrated by discharging a firearm from a motor vehicle with the intent to inflict death within the meaning of section 190.2, subdivision (a)(21). Counts 2, 3, 4, and 5 charged appellants with the attempted premeditated and deliberate murders of Ray P., Shalisa H., Celeste M., and Joseph A. in violation of sections 664 and 187. Appellants were charged in count 6 with discharging a firearm from a motor vehicle in violation of section 246.

In count 7, Chavez was charged with permitting the discharge of a firearm from his vehicle in violation of section 12034, subdivision (b). With respect to counts 1 through 5, it was alleged that Prado and Guzman personally used a firearm within the meaning of section 12022.5, subdivision (a)(1), and that they discharged a firearm from a motor vehicle causing great bodily injury within the meaning of section 12022.5, subdivision (b)(1). As to counts 1 through 5, it was alleged that Chavez was armed with a firearm within the meaning of section 12022, subdivision (a)(1). With respect to count 2, Guzman was alleged to have personally inflicted great bodily injury within the meaning of section 12022.7. Finally, as to count 3, it was alleged that Prado personally inflicted great bodily injury within the meaning of section 12022.7.

A jury returned guilty verdicts on all counts and found all special allegations to be true. Each appellant received a sentence of life without the possibility of parole on count 1 and four consecutive sentences of life with the possibility of parole on counts 2, 3, 4 and 5. A number of sentence enhancements were also imposed on each appellant.

## ***FACTUAL HISTORY***

Marlene Romero was shot in the head at about 12:45 a.m. on November 23, 1997, as she, Ray, Shalisa, and Celeste rode with Joseph in Joseph's father's Dodge Neon on

[1]All further statutory references will be to the Penal Code unless otherwise stated.

Highway 65. Marlene died at a hospital the same morning. Ray and Shalisa also sustained gunshot wounds.

The shots were fired from a Honda Civic that pulled alongside the Neon on the highway. Chavez drove the Civic and Guzman and Prado were passengers. A Honda Accord, driven by Prado's cousin (also named Alejandro, and referred to in the record as Big Alex), followed behind the Neon as the shootings occurred. Police investigators found gunshot residue on Prado and on the Civic and found Prado's fingerprints on the Civic. A shell casing from one of the two guns used in the shootings was found at Prado's house. Guzman and Chavez admitted to police that they were in the Civic; Chavez admitted that he drove it and that Guzman and Prado fired shots from it at the Neon. Guzman testified at trial that he had fired a gun out the window of the Civic during the encounter with the Neon. Celeste and Shalisa identified Prado and Guzman as the passengers in the Neon.

The shootings occurred several hours after another hostile encounter between occupants of the Civic and the Neon. As the two cars drove down a street, Big Alex, then in the Civic, had argued with Shalisa, whom he formerly had dated. Other occupants of the Civic shouted and gestured at Joseph as he drove. Chavez told police that he, Prado, and Guzman went out in the Civic to find the Neon later, shortly before the shootings occurred.

## ***DISCUSSION***

### *I. The first degree murder instructions*

Section 187 defines the crime of murder as the "unlawful killing of a human being … with malice aforethought." (§ 187, subd. (a).) Malice aforethought "may be express or implied." (§ 188.) "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*)

First degree murder was presented to the jury on two theories: premeditated and deliberated murder with express malice, and "drive-by" murder, or murder "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death …." (§ 189) The jury also considered second degree murder on several theories.

On the first degree murder charges, the court gave the jury CALJIC No. 8.21 (1998 rev.), the felony-murder instruction, modified to specify "the crime of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle, when the perpetrator specifically intended to inflict death" as the predicate felony. This instruction states that a killing that occurs during the intentional commission of the predicate felony is first degree murder regardless of whether the killing is "intentional, unintentional, or accidental." The court gave a similar instruction on aider-and-abettor liability for felony murder based on CALJIC No. 8.27 (1998 rev.).

Appellants contend that these instructions were erroneous because the drive-by-shooting component of section 189 is not an enumerated felony under the felony-murder rule. They contend that section 189 is only to be used to fix the degree of murder after malice has been established. Because drive-by shooting is not an enumerated felony, appellants argue, the jury must find malice aforethought; but the felony-murder instruction does not require such a finding.

Respondent argues that the drive-by-shooting clause in section 189 is intended to operate as the functional equivalent of an enumerated felony under the felony-murder rule and that the court's instructions were correct. Alternatively, assuming the drive-by-shooting clause of section 189 does not define an enumerated felony for purposes of the felony-murder rule, respondent contends that the jury necessarily found malice. Consequently, respondent argues, appellants suffered no prejudice from the giving of the instructions.

We answer two questions: (1) Does the drive-by-shooting clause of section 189 define an enumerated felony within the felony-murder rule? (2) If not, did the court's felony-murder instructions constitute prejudicial error?

### *A. Status of the drive-by-shooting clause of section 189*

In *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163-164, the court explains that section 189 establishes three categories of first degree murder:

> "Section 189 … first establishes a category of first degree murder consisting of various types of premeditated killings, and specifies certain circumstances (use of explosives or armor-piercing ammunition, torture, etc.) which are deemed the equivalent of premeditation. Section 189 secondly establishes a category of first degree felony murders (murders perpetrated during felonies or attempted felonies such as arson, rape, carjacking, etc.). Finally, section 189 establishes a third category consisting of only one item, intentional murder by shooting out of a vehicle with intent to kill."

Respondent contends that a killing committed in the course of a drive-by shooting really belongs in the second category and adds to the list of enumerated felonies within the felony-murder rule. We disagree.

Under the felony-murder rule, a killing, whether intentional or unintentional, is first degree murder if committed in the perpetration of, or the attempt to perpetrate, certain serious felonies. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 134, p. 750.) The ordinary mental-state elements of first degree murder—malice and premeditation—are eliminated by the doctrine. The only criminal intent required to be proved is the specific intent to commit the particular underlying felony. (*Id.*, § 135, pp. 750-751.) Thus, the question before us is whether, in adding the drive-by-shooting clause to section 189 in 1993, the Legislature created an offense that constitutes murder but requires no particular mental state with respect to killing.

In interpreting section 189, our objective is "to ascertain and effectuate legislative intent." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) To the extent that the language in the statute may be unclear, we look to legislative history and the statutory

scheme of which the statute is a part. (*People v. Bartlett* (1990) 226 Cal.App.3d 244, 250.)

The Legislature's intent is unmistakable here. Although the drive-by-shooting clause appears immediately after the list of enumerated felonies in section 189, it is clear from the content of the clause that drive-by shooting is not part of that list. The drive-by-shooting clause requires an "intent to inflict death" which is never an element of felony murder. Several cases confirm that the Legislature meant what it said when it required an intent to kill in the drive-by-shooting clause. (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 164, fn. 5 [section 189 requires that shooting out of vehicle be both intentionally at another person and with intent to inflict death]; *People v. Sanchez* (2001) 26 Cal.4th 834, 848-849 [first degree murder established under section 189 where defendant fired out of vehicle intentionally, with specific intent to inflict death].) First degree drive-by murder under section 189 is not felony murder because it requires a mental state that felony murder does not require.

Although we have concluded that the meaning of section 189 is clear, in the event a reader has any doubt, he or she may easily extinguish it by looking at the legislative history. Senate Bill No. 310 was enacted in 1993, amending sections 189, 190, and 12022.5. (§ 189, as amended by Stats. 1993, ch. 609, § 1, p. 3265.) Senator Ruben Ayala introduced the bill, stating:

> "… Existing law describes murder of the 1st degree as all murders which, among other things, are committed in the perpetration of, or attempt to perpetrate, certain enumerated felonies and specified sex crimes. [¶] This bill would add to the list of specified crimes a murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." (Legis. Counsel's Dig., Sen. Bill. No. 310, 5 Stats. 1993 (1993-1994 Reg. Sess.) Summary Dig., p. 236.)

When the bill was signed on September 29, 1993, Governor Pete Wilson's signature message heralded the fact that this amendment to section 189 "adds intentional drive-by killing to the first degree murder statute …." (Historical and Statutory Notes,

47A West's Ann. Pen. Code (1999 ed.) foll. § 189, p. 93.) Expressly designed to curb violence, the message reiterated that the codification of "drive-by killing in the first degree murder statute allows prosecutors to convict drive-by assassins upon proof of a specific intent to kill." (*Ibid.*)

Although Senator Ayala's statement seems to add drive-by shooting to a list of other felonies, it also acknowledges there must be an "intent to inflict death." As a result, it is, by definition, different from the other listed felonies. Governor Wilson's message similarly recognizes the requirement of a specific intent to kill.

In sum, we hold that the drive-by-shooting clause added to section 189 in 1993 is not an enumerated felony for purposes of the felony-murder rule. We further conclude that although premeditation is not required to establish first degree murder under this clause, a specific intent to kill is required. And, as is well established, proof of an unlawful intent to kill is the functional equivalent of express malice. (*People v. Swain* (1996) 12 Cal.4th 593, 601.)

Accordingly, the court erred in giving felony-murder instructions on the first degree murder charges. In stating that the jury must find that the "perpetrator specifically intended to inflict death," but also that it was irrelevant whether the killing was "intentional, unintentional, or accidental," these instructions were inconsistent on the issue of whether the jury must find that the killings were intentional.

***B. Prejudicial impact of giving felony-murder instructions***

Because they were inconsistent on the point of intent, the instructions given could have removed the mental-state element of the offenses from the jury's consideration. Therefore, federal due process is implicated, and the *Chapman v. California* (1967) 386 U.S. 18 beyond-a-reasonable-doubt standard for assessing prejudice applies. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Lee* (1987) 43 Cal.3d 666, 673-674; *People v. Self* (1993) 12 Cal.App.4th 1222, 1226-1227, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

In assessing prejudice, we consider whether "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Further, "[t]o say that an error did not contribute to the verdict is … to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, at p. 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [proper *Chapman* inquiry is whether guilty verdict was surely not attributable to error].) The evidence must be "'of such compelling force as to show beyond a reasonable doubt' that the erroneous instruction 'must have made no difference in reaching the verdict obtained.'" (*People v. Harris* (1994) 9 Cal.4th 407, 431, quoting *Yates v. Evatt*, *supra*, 500 U.S. at p. 407.) Employing this standard, we conclude the error was harmless.

Significantly, the correct murder instructions were also presented to the jury. CALJIC No. 8.10, which defines murder, was given as modified:

> "The defendants are accused in Count 1 of the Information of the crime of murder, a violation of Penal Code Section 187. Every person who unlawfully kills a human being with malice aforethought or was perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, or it occurred during the commission of the crime of shooting at an occupied vehicle which is a felony inherently dangerous to human life, is guilty of the crime of murder, a violation of Penal Code section 187. [¶] A killing is unlawful if it was neither justifiable nor excusable. In order to prove the crime of murder, each of the following elements must be proved: One, a human being was killed; two, the killing was unlawful; three, the killing was done with malice aforethought or was perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death or occurred during the commission of a felony inherently dangerous to human life."

In addition, CALJIC No. 8.25.1 was given, which states:

> "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally and at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree."

Other instructions given include CALJIC No. 3.31, concurrence of act and specific intent, and CALJIC No. 3.31.5, which defines mental state. Malice aforethought was defined in CALJIC No. 8.11; deliberate and premeditated murder was defined in CALJIC No. 8.20. Also included were CALJIC No. 3.01, defining aiding and abetting and the requirement that the aider and abettor act with knowledge of the unlawful purpose of the perpetrator and with the intent of committing or encouraging the commission of the crime.

In addition, closing arguments to the jury are relevant in evaluating prejudice. (See *People v. Lee*, *supra*, 43 Cal.3d at p. 677.) Here, the prosecutor's closing argument stressed the essential requirement of an intent to kill in order to convict of first degree murder:

> "With respect to first degree murder, there is express malice first degree murder, things that you look for with respect to express malice first degree murder are the number of bullets that went into this particular vehicle, the location of where the bullet holes were, the hunting down of the victims.…
>
> "The reason that the prosecution spent a significant amount of time with respect to what occurred prior to the actual shooting, is to show the intent of these three defendants, the intent to go after these victims, to hunt them down, loaded with weapons in their car, and to kill them.
>
> "With respect to first degree express malice, premeditation means it has to be considered beforehand. There's no timetable. The law does not say they have to think about it for 30 minutes before they do it. You have to take a look at all the factors that exist prior to the shooting, prior to this killing. Deliberations weighs—when an individual weighs the pros and cons having the consequences in mind, decides to and does kill.
>
> "Premeditation and deliberation, it's not a duration of time, but it's an extent of the reflection. Again, I know all of these things are coming in.

> You have to try to look at the instructions and it will tell you what premeditated, deliberated first degree murder is.
>
> "The issue as to the intent to kill can be arrived at in a short period of time. Again, going back to the facts of this case, what led up to this killing, is extremely significant. But you can also take into consideration when determining whether an individual is guilty of first degree murder the actual shooting, the actual killing itself. Again, the reason that Steven O'Clair from Department of Justice came down and spent a significant amount of time with respect to where the bullet holes were in the car, which bullet hit which person, the opinion that he stated as to how many guns were used, all of that information is extremely significant and extremely relevant in determining whether an individual intended to kill someone, whether these defendants intended to kill someone."

The prosecutor also accurately told the jury that if it found appellants guilty of first degree murder, it had to next find the alleged special circumstances to be true. The prosecutor emphasized that three elements had to be proven beyond a reasonable doubt. These include discharging a firearm from a motor vehicle, intentionally firing at persons outside the vehicle, and doing so with the intent to inflict death. Later, as part of the same argument, the prosecutor reminded the jury that she was relying on two theories with respect to first degree murder and three with respect to second degree murder.

The prosecutor described the first degree murder theories as follows:

> "[T]he first theory is that the defendants intended to kill the victims. That's first degree murder. If the killing was premeditated and deliberated, express malice.… [¶] … [¶]
>
> "Drive by murder is the second theory the prosecution presents to you for first degree murder. In essence, what that instruction says is murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death. That's murder in the first degree."

The only time the prosecutor said that a killing could be "intentional, unintentional, or accidental" was in explaining second degree felony murder, which was consistent with the instructions given defining second degree felony murder, CALJIC Nos. 8.32 and 8.34.

In addition, evidence of appellants' intent to kill was strong. Chavez was in the car that initially interacted with Joseph and the occupants of the Dodge Neon earlier in the evening. Big Alex, who was also in the car, testified that Chavez was upset afterward. Almost four hours later, Prado, Guzman, and Chavez followed Joseph, this time onto the highway. Big Alex, in a third car, followed appellants' car at their request. Big Alex witnessed "flashes" coming from appellants' car.

When Chavez spoke to an officer after his arrest, he admitted driving the car and that there were two guns inside. He also acknowledged that appellants went out to look for Joseph's car.

Daniel T., who was in custody with Guzman, testified that Guzman told him he had shot someone in a drive-by shooting and that the intended victim was "some guy." Barry M., who was also in custody, told an investigator that Guzman stated he was the shooter. He also said that Chavez did not know there were guns in the car but that they had gone to fight "some other guys."

At trial, Chavez admitted he was willing to fight Joseph and that both Guzman and Prado had guns. Although equivocal about whether he had talked about encountering Joseph's car while at Prado's house, Chavez acknowledged telling the police that he, Prado, and Guzman left the house to look for it.

This jury was told numerous times that a conviction of murder required proof of a specific intent to kill. The prosecutor consistently emphasized the requirement of finding an intent to kill. Further, the instructions accurately advised the jury that the specific intent to kill while firing intentionally at a person outside the vehicle had to be proven by the prosecution. For all these reasons, we conclude beyond a reasonable doubt that the jury believed proof of intent to kill was required to find appellants guilty of murder in the first degree. Consequently, the instructional error was harmless beyond a reasonable doubt. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 58-59 [misleading instructions

relating to intent to kill as to charge of attempted murder harmless beyond a reasonable doubt].)

***II. Instructions on aider-and-abettor liability***

Prado and Guzman argue that the jury was improperly instructed regarding aider-and-abettor liability. The jury was instructed on aider-and-abettor liability with CALJIC No. 3.01 as follows:

> "A person aids and abets the commission or attempted commission of a crime when he, one, with knowledge of the unlawful purpose of the perpetrator, and, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and three, by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that the crime is being committed and the failure to prevent it does not amount to aiding and abetting."

Prado and Guzman did not object to this instruction at trial. Now, however, they argue that the instruction was inadequate because it does not state that their intent to aid and abet must have been formed before or during the commission of the crimes.

*People v. Williams* (1997) 16 Cal.4th 635 controls this issue. There, the defendant was charged with four murders that he committed with two companions. (*Id.* at p. 647.) On appeal, the defendant claimed that CALJIC No. 3.01 was ambiguous in that it did not clarify that the intent of an aider and abettor necessarily must be formed before or during the actual offense and not after. (*People v. Williams*, *supra*, at p. 675.) The court rejected the contention, stating, "[w]e discern no such ambiguity." (*Ibid.*) Prado and Guzman's contention therefore lacks merit.

Appellants' reliance on *People v. Esquivel* (1994) 28 Cal.App.4th 1386 is misplaced. There, the defendant was found guilty of first degree murder based on a felony-murder theory. There was some evidence from which the jury could have found that the robbery of the victim occurred after the victim died and that the defendant aided only in the robbery. The prosecutor argued the defendant was guilty of felony murder

even if he did not join in the plan to rob until after the murder, as long as one of his codefendants planned to rob the victim before the murder. (*Id*. at p. 1394.) On appeal, the defendant argued the instructions were erroneous because none informed the jury that the defendant had to have formed the intent to participate in the robbery before the murder was committed in order to be found guilty of felony murder. (*Ibid*.) The court agreed. (*Id.* at p. 1400.)

Here, the prosecution did not advance the theory that any of the appellants were liable for any actions taken after the shooting, nor was there any evidence to support this theory. *Esquivel* does not apply.

***III. Instructions on the drive-by special circumstance***

The information alleged that, as to each appellant, the murder was committed by means set forth in section 190.2, subdivision (a)(21): "The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." Section 190.2, subdivision (c), provides:

> "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4."

As a result, the drive-by special circumstance can be applied to an aider and abettor only upon proof he or she harbored the intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 688, fn. 21.)

Appellants contend the instructions given were flawed because they failed to require a finding that each appellant intended to kill even if he only aided and abetted in the murder. Respondent acknowledges there was instructional error but submits that, under the facts of this case, the error was harmless, at least as to Prado and Guzman.

The special-circumstance instruction, CALJIC No. 8.80.1 (1997 rev.), as given, stated:

> "If you find a defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true [or not true]: Intentional discharge of a firearm from a motor vehicle. The People have the burden of proving the truth of this special circumstance. If you have a reasonable doubt as to whether this special circumstance is true, you must find it to be not true.
>
> "You must decide separately as to each of the defendants the existence or nonexistence of the special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your finding as to the one or more which you agree.
>
> "… [I]n order to find a special circumstance alleged in this case to be true or not true, you must agree unanimously. That special circumstance, once again, is discharging a firearm from a motor vehicle intentionally at another person outside the vehicle intending to inflict death. You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied."

The portion of the instruction which should have been given, but was not, states:

> "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder in the first degree …." (CALJIC No. 8.80.1.)

The court further instructed pursuant to CALJIC No. 8.81.21:

> "To find the special circumstance referred to in these instructions as murder by means of an intentional discharge of a firearm from a motor vehicle is true, it must be proved, one, a murder was perpetrated by means of discharging a firearm from a motor vehicle; two, the perpetrator intentionally discharged the firearm at a person or another person outside of the vehicle; and three, the perpetrator at the time he discharged the firearm intended to inflict death."

When a trial court fails to instruct on an element of a special-circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v.*

*California*, *supra*, 386 U.S. 18, 24. (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.) When there is evidence from which a jury could base its verdict on the theory that a defendant was a mere aider and abettor to a murder, the trial court is required to instruct the jury that it must find that the defendant, if not the actual killer, intended to kill. (*People v. Hardy* (1992) 2 Cal.4th 86, 192; *People v. Garrison* (1989) 47 Cal.3d 746, 789.) Failure to give this instruction does not require reversal if the error is harmless beyond a reasonable doubt. (*People v. Garrison*, *supra*, at p. 789; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

This error may be harmless if the jury necessarily found an intent to kill under other properly given jury instructions, or the evidence of the intent to kill was overwhelming and the jury could have had no reasonable doubt that the defendant had the intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.)

Based on the evidence here, there is no doubt that Prado and Guzman intended to kill. The jury's special-allegation findings of personal firearm use and infliction of great bodily injury on victims Ray and Shalisa remove any doubt on this point. As a result, the jury found that both Guzman and Prado, as shooters, were guilty of "discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (§ 190.2, subd. (a)(21).) Also, as set forth in section I.B., *ante*, it is clear that the underlying conviction was based on instructions requiring a finding of intent to kill. Thus, there is no question that the jury, under those other instructions and based on the evidence at trial, found an intent to kill. It follows that any instructional error with respect to the special circumstance alleged against Guzman and Prado was harmless.

Respondent believes that the issue is different with respect to Chavez. Respondent conceded during oral argument that the special-circumstance allegation should be stricken as to him. It appears respondent supposed that the jury could have convicted Chavez of first degree murder based on the "natural and probable consequences" theory

of aider-and-abettor liability—which has no intent-to-kill requirement—even though the jury was instructed on that theory only for second degree murder.

We disagree. The jury could have returned a guilty verdict on first degree murder based on the natural-and-probable consequences doctrine only by flatly disregarding the fact that this instruction was only given for second degree murder. "Absent evidence to the contrary, we must assume that the jury followed the court's instructions." (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 409.) This principle has long been established. (See, e.g., *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 478-479 ["It must be assumed that the jury understood the instructions and correctly applied them to the evidence"]; *Com. Bonding & Cas. Ins. Co. v. Pacific Elec. Ry. Co.* (1919) 42 Cal.App. 573, 578 ["It is only in the event that the evidence does not support the verdict that we can say that the instructions were not followed"].) Nothing has been presented to rebut this presumption. Accordingly, it is beyond reasonable doubt that the jury found Chavez to have had an intent to kill for the reasons set forth in section I.B, *ante*. This conclusion is reinforced by the prosecutor's closing argument on the special circumstance as to Chavez:

> "If you find that a defendant was not the actual killer of the victim, or you were unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted or assisted any actor in the commission of the murder in the first degree.
>
> "Again, if you find that Marcos Chavez went out there with these other two individuals with the intent to kill and was an aider and abettor, you can find him guilty as well of the special circumstance. And you have to decide each defendant's culpability separately.…"

Chavez's reliance on *People v. Williams*, *supra*, 16 Cal.4th 635 and *People v. Marshall* (1997) 15 Cal.4th 1 is misplaced. In both cases, the court reversed special-circumstance verdicts because of a failure to give an intent-to-kill instruction. But, unlike here, in neither of these cases did the jury's guilty verdict on the underlying murder

charges necessitate a finding of intent to kill. In *Williams*, the court stated that the jury could have based its first degree murder verdicts on a natural-and-probable-consequences instruction given by the court; there is no indication in the court's opinion that this instruction was limited, as here, to a theory of second degree murder. (*People v. Williams, supra,* 16 Cal.4th at p. 691.) Moreover, there were concrete signs that the jury relied on the natural-and-probable-consequences instruction. Having found the defendant guilty as an aider and abettor of four counts of first degree murder, the jury asked the judge what intent-to-kill requirement there was for the multiple-murder special circumstance. The judge answered that it was the same as the intent-to-kill element in the instruction she had given regarding aider-and-abettor liability. The jury nevertheless hung on the special circumstance, implying that it relied on the natural-and-probable-consequences instruction—not the aider-and-abettor instruction with its intent requirement—in finding the defendant guilty of murder. (*Ibid.*) The special circumstance was retried to a second jury, which found it true on the sole basis of testimony by the court clerk that the defendant had in fact been convicted of four counts of first degree murder in the prior proceeding. (*Id.* at p. 687.) Thus, it apparently was never found in *Williams* that the defendant had an intent to kill.

In *Marshall*, the underlying murder conviction was felony murder based on attempted rape. The jury found true a special circumstance of murder committed in the perpetration of attempted rape; but there was no instruction that the jury must find an intent to kill to establish the special circumstance. This was reversible error because, in light of the fact that the underlying crime—felony murder—did not require an intent to kill, there was no basis to impute to the jury a finding of intent to kill despite the instructional error. (*People v. Marshall, supra,* 15 Cal.4th at pp. 41-42.) Again, the present case is dissimilar. Here the first degree murder verdict based on the drive-by shooting provision of section 189 necessitated a finding of intent to kill.

Under the circumstances, we conclude beyond a reasonable doubt that the trial court's failure to instruct on the element of intent to kill on the special-circumstance allegation was not prejudicial error as to any appellant.

## *IV. Constitutionality of drive-by special circumstance*

Section 190.2, subdivision (a)(21), provides that a first degree murder that is "intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death" is punishable by death or life without the possibility of parole. Appellants argue that the special circumstance established by this provision is unconstitutional because (a) it is overbroad and (b) it violates the Eighth Amendment to the United States Constitution. The death penalty was neither sought nor imposed here, so we need not address appellants' argument that section 190.2, subdivision (a)(21), establishes an impermissible basis for death eligibility. (*People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 165.)

### *A. Overbreadth*

As in *People v. Rodriguez*, *supra*, 66 Cal.App.4th 157, appellants argue that section 190.2, subdivision (a)(21), is facially overbroad. A statute is unconstitutionally overbroad on its face if it "can 'chill' the exercise of constitutional rights." (*Rodriguez, supra,* at p. 170.) *Rodriguez* rejected the same argument, and we need not repeat the discussion here. After a thorough analysis of the issue, the court in *Rodriguez* found that the special circumstance was not unconstitutional on its face. (*Id.* at pp. 161-162, 166-167, 172.) We agree.

Appellants also argue that section 190.2, subdivision (a)(21), is unconstitutional as applied to them because the murder was elevated to first degree murder under section 189 by operation of the same facts which establish the special circumstance, rather than by a finding of premeditation. The same argument was rejected in *Lowenfield v. Phelps* (1988) 484 U.S. 231 [special circumstance of multiple murder may duplicate elements

defining defendant's crime as first degree murder]. (See also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, fn. 12 [rejecting similar argument regarding lying-in-wait special circumstance].) Section 190.2, subdivision (a)(21), is thus not unconstitutional on these grounds.

***B. Eighth Amendment***

Prado argues that the drive-by special circumstance could be found true of a defendant even if his presence in the car were "mere happenstance." Guzman contends that the shooting resembled imperfect self defense following a heated exchange and, thus, involved no great degree of culpability. Chavez claims he was a mere aider and abettor. In effect, Prado, Guzman, and Chavez argue that a sentence of life without possibility of parole for what theoretically could have been either an unpremeditated or an unintentional killing is excessive under the Eighth Amendment.

But the notion that the killing could *theoretically* have been unintentional or unpremeditated is irrelevant. The jury found appellants had a specific intent to inflict death, and the evidence supports premeditation. Even if there were no premeditation, life without the possibility of parole would not be cruel or unusual punishment for this crime. As explained in *People v. Rodriguez*:

> "[C]ase law suggests that even a sentence of death for intentionally shooting a victim with intent to kill would not violate the Eighth Amendment of the United States Constitution. Jurisdiction to determine the validity of a death sentence lies in the California Supreme Court, rather than in the Court of Appeal, and we therefore do not purport to decide that issue here. However, the cases bearing on the circumstances in which death is a permissible sentence inferentially also bear upon the LWOP [life without parole] sentence imposed here, for if death is a permissible sentence, it follows that an LWOP sentence cannot violate the Eighth Amendment." (*People v. Rodriguez, supra*, 66 Cal.App.4th at p. 173.)

Indeed, the same punishment is constitutional for lesser crimes than intentional but unpremeditated killing. *Harmelin v. Michigan* (1991) 501 U.S. 957, for example, upheld a sentence of life without possibility of parole for possession of 672 grams of cocaine, a

serious crime, but less heinous than shooting a victim with the intent to kill. In light of *Harmelin*, "the length of a sentence of imprisonment is largely a matter of legislative prerogative, and cannot violate the Eighth Amendment in any but the rarest cases." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.)

We conclude that the application of section 190.2, subdivision (a)(21), in this case, is not unconstitutional under the Eighth Amendment.

***V. Jury unanimity on theory of murder***

Two theories of first degree murder were argued to the jury: premeditated and deliberate murder, and murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person with the intent to inflict death. Appellants contend that in light of the instructions and on this record, it cannot be determined which theory the jury used to reach its guilty verdict. The trial court refused the request of Guzman's counsel to ask the jury which theory it relied on in reaching a verdict of first degree murder. Appellants assert that the degree of moral culpability associated with premeditated and deliberate murder is different from the degree of moral culpability associated with a killing perpetrated by shooting from a motor vehicle. As a result, they argue, federal due process requires that the jury agree unanimously on one theory.

Appellants cite *Schad v. Arizona* (1991) 501 U.S. 624 for the argument that the jury should have been required to unanimously agree on a theory of first degree murder. *Schad*, however, does not support their position. In *Schad*, the United States Supreme Court was confronted with the question of whether due process required jury unanimity on the state's theory of first degree murder. At trial, the prosecution advanced both premeditated and felony-murder theories, and the jury's general verdict failed to indicate upon which theory it relied. The defendant argued that premeditated murder and felony murder essentially constituted separate crimes as to which the jury must return individual verdicts. The high court disagreed.

Writing for the plurality, Justice Souter explained that due process principles limit "a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 632.) However, the plurality refused to adopt any single test for determining when that limit had been exceeded. It stated that its "sense of appropriate specificity [in defining offenses] is a distillate of the concept of due process with its demands for fundamental fairness, [citation], and for the rationality that is an essential component of that fairness." (*Id.* at p. 637.)

*Schad* offered several factors to be considered in applying this conceptual approach. First, because defining criminal conduct is a legislative prerogative, courts should refrain from second-guessing what facts are necessary to constitute an offense and must necessarily be proven individually. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 638.) Second, courts must assess whether the state's particular way of defining a crime has a long history or widespread use. (*Id.* at p. 640.) If the state's definition has "historical and contemporary acceptance," it more probably comports with fundamental principles of justice. (*Id.* at p. 642.) Finally, courts should determine whether the challenged mental states are morally equivalent in terms of culpability. (*Id.* at p. 643.)

Appellants argue that the result in *Schad* was only possible because, historically, the law has generally viewed as equally blameworthy those who kill with premeditation and deliberation and those who kill in the course of committing a felony. Appellants argue that, in this case, the two mental states at issue are not equally blameworthy.

Appellants first claim that a murder committed by shooting from a vehicle with the intent to kill has not been historically accepted as first degree murder. This particular means of establishing mens rea was not added to the Penal Code until 1994. But *Schad* states:

> "We note … the perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases, like this one, that deal with crimes that existed at common law." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 640, fn. 7.)

Here the Legislature designated drive-by murder as first degree murder—the most culpable kind.

Appellants argue that the Legislature's inclusion of all intentional killings committed by shooting from a motor vehicle does not show that this crime is as culpable as premeditated and deliberate murder. We disagree. The Legislature's determination that drive-by murder is first degree murder puts it on the same level as premeditated and deliberate murder.

The reasoning in *Schad* points in the same direction. Although premeditated murder is characterized by a planned, deliberate intent to kill (see *People v. Anderson* (1968) 70 Cal.2d 15, 24-25), and felony murder merely requires the intent to commit the underlying felony (*People v. Hernandez* (1988) 47 Cal.3d 315, 346), *Schad* found the two mental states were sufficiently alike to be treated as alternative means of satisfying the mens rea requirement for first degree murder.

Using the mental states involved in *Schad* as guideposts, we conclude that premeditated murder and shooting intentionally out of a vehicle with the intent to inflict death are sufficiently morally similar. On the one hand, a person who kills with express or implied malice is less culpable than someone who kills also with premeditation and deliberation. On the other hand, the mental state associated with either express or implied malice is more blameworthy than the mindset needed for felony murder, since felony murder does not require any intent to kill. Because the range of culpability between premeditated murder and intentional killing is narrower than the culpability levels deemed equivalent in *Schad*, it follows that the two mental states at issue here are morally similar enough to withstand due process analysis. (See also *People v. Brown*

(1995) 35 Cal.App.4th 708, 715 [determining express and implied malice are on moral par pursuant to *Schad*].)

The trial court did not err in failing to have the jury agree on one theory of murder.

### *VI. Attempted murder instructions as to Chavez*

Chavez was charged under section 664 with four counts of attempted willful, deliberate, and premeditated murder for the attacks on Ray, Shalisa, Celeste, and Joseph. This appeal is before us for the second time, the Supreme Court having transferred review to us on November 12, 2003, for reconsideration in light of *People v. Lee* (2003) 31 Cal.4th 613. As relevant here, the Supreme Court's opinion in *Lee* affects only Chavez and only these four counts.

At the time the crimes were committed, section 664 provided:

> "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:
>
> "(a) [I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole …. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (Stats. 1994, ch. 793, § 1.)

As previously observed, the evidence reflects that Chavez was the driver and not an actual shooter. The prosecutor argued only that he was an aider and abettor to the four attempted murders. Chavez was convicted on the four counts and sentenced to four terms of life with the possibility of parole.

Chavez argues that the instructions given to the jury on these four charges were erroneous. They did not state that, to find him guilty of attempted willful, deliberate, and premeditated murder the jury had to find that, in aiding and abetting the shooters, Chavez had the requisite mental states with respect to the murders attempted. The court

instructed the jury pursuant to CALJIC No. 8.67, defining attempted willful, deliberate, and premeditated murder, stating:

> "It is also alleged in those Counts [2] through 5 of attempted murder that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. Willful means intentional. Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.
>
> "Premeditated means considered beforehand. If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate and premeditated murder. [¶] … To constitute deliberate and premeditated attempted murder, the would-be slayer must weigh and consider the questions of killing and the reasons for and against such a course, and having in mind the consequences decides to kill and makes a direct but ineffectual act to kill another human being."

In our original opinion, filed August 12, 2002, we held that, under section 664, an attempter must be proved to have had the mental states of willfulness, deliberation, and premeditation with respect to the murders in order to be sentenced to life with the possibility of parole. Therefore, we concluded, in the case of an aider and abettor, the jury instructions must make clear that the accused, and not only those he aided and abetted, must have these mental states. We held that, by referring only to the state of mind of the would-be slayer, the instructions given here failed to place before the jury the question of whether Chavez had the required mental states.

In *People v. Lee* (2000) 85 Cal.App.4th 706 (review granted and opinion superseded by *People v. Lee, supra,* 31 Cal.4th 613), we considered the same issue, and reached the same conclusion, but held that the error there was harmless. The Supreme Court granted review and, in *People v. Lee, supra,* 31 Cal.4th 613, held that there was no error. The Supreme Court concluded that "section 664(a) properly must be interpreted to

require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted with willfulness, deliberation, and premeditation, even if he or she is guilty as an aider and abettor." (*Id.* at p. 627.) The Supreme Court ordered us to reconsider our holding in this case in light of this conclusion.

It follows from the Supreme Court's holding that the trial court did not err in omitting any requirement that Chavez personally acted with willfulness, deliberation, and premeditation.

***VII. Enhancement of sentences pursuant to section 12000.5, subdivision (b)(1)***

Guzman and Prado were both sentenced to four consecutive terms of life with the possibility of parole on the four attempted murder counts. All counts were enhanced by 10 years pursuant to section 12022.5, subdivision (b)(1). Guzman and Prado were sentenced to life without the possibility of parole on the murder charged in count 1. This count was also enhanced by 10 years pursuant to section 12022.5, subdivision (b)(1). Guzman and Prado contend section 654 precludes enhancing their murder sentence pursuant to section 12022.5, subdivision (b)(1).

The special circumstance, which requires that the sentence be one of life without the possibility of parole, was the drive-by-shooting special circumstance under section 190.2, subdivision (a)(21). The identical firearm-use allegation then added a 10-year determinate term enhancement to Guzman and Prado's sentences. Guzman and Prado argue that they are being punished twice for the same act in violation of section 654.

We conclude that Guzman and Prado were properly sentenced. Section 12022.5, subdivision (a), does prohibit dual use, i.e., it does not apply when the firearm use is an element of the offense. Section 12022.5, subdivision (b)(1), however, does not include this restriction. Subdivision (b)(1) states:

> "[A]ny person who is convicted of a felony or an attempt to commit a felony, including murder or attempted murder, in which that person discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to the person of another, shall, upon conviction of that felony or attempted felony, in addition and consecutive to the sentence prescribed for the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years."

In addition, section 12022.5, subdivision (d), states that the "additional term provided by this section may be imposed in cases of … murder if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death."

We conclude the Legislature intended that the 10-year enhancement for discharging a firearm at an occupied vehicle causing death applies to a defendant convicted of a drive-by murder. Consequently, the trial court did not err in imposing the section 12022.5, subdivision (b)(1), enhancement.

### *VIII. Enhancement of murder sentence under section 12022, subdivision (a)(1)*

The trial court imposed on Chavez a term of life without possibility of parole based on the jury's findings that the murder was perpetrated by discharging a firearm from a vehicle pursuant to section 190.2, subdivision (a)(21). The court also imposed an additional four months for the vicarious use of a firearm pursuant to section 12022, subdivision (a)(1). Chavez argues that this enhancement impermissibly punished him twice for the same conduct in violation of section 654. We agree.

Section 12022, subdivision (a)(1), provides:

> "Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless the arming is an element of the offense of which he or she was convicted. This additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or

more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

Section 12022 prohibits application of the enhancement where being armed with a firearm is an element of the offense. There is no exception to this prohibition similar to the one in section 12022.5, subdivision (d). Thus, the additional punishment imposed must be stayed.

***IX. Consecutive sentencing under section 12034, subdivision (b)***

Chavez was convicted in count 7 of violating section 12034, subdivision (b), which states:

> "Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years."

Chavez argues that the conduct supporting the conviction for this section was the same that supported the conviction for murder in count 1, and section 654 prohibits imposition of multiple punishments for the same act.

Respondent agrees, as do we. The eight-month term imposed pursuant to count 7 is stayed.

***X. Imposition of fine under section 1202.45***

At sentencing, the trial court imposed a fine on Chavez of $10,000 pursuant to section 1202.45, which was stayed pending successful completion of parole. A similar fine was not imposed on Prado or Guzman.

Chavez correctly argues that section 1202.45 does not apply to a defendant whose sentence includes life in prison without possibility of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178.) Section 1202.45 states:

> "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an

additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

It does not matter that the defendant also received a sentence that allows parole; the section applies to the case as a whole, not the sentences on individual counts. (*People v. Oganesyan*, *supra*, 70 Cal.App.4th at p. 1185.) The fine should not have been imposed on Chavez because he was sentenced to life without the possibility of parole.

## ***DISPOSITION***

The judgment is affirmed as to Prado and Guzman. Chavez's four-month section 12022, subdivision (a)(1), enhancement and eight-month sentence imposed in count 7 are stayed pursuant to section 654. The $10,000 section 1202.45 fine imposed on Chavez is ordered stricken. In all other respects, the judgment as to Chavez is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Harris, Acting P.J.

_____
Gomes, J.